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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 127

UNITED CONSTRUCTION COMPANY,
Petitioner,

vs.

G. SAM MILAM AND ROBERT M. COLEMAN, JR.,
TRUSTEES FOR DIAMOND ROCK ASPHALT CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner herein filed an amended and substituted intervening petition (Rec. 9) against the respondents who were trustees in bankruptcy under a Section 77B proceeding of the Bankruptcy Act as amended which proceeding

was then pending in the U. S. District Court for the Western District of Kentucky seeking to reclaim property sold to the bankrupt under a conditional sale agreement.

The respondents filed an answer to said petition and the case was submitted to the Trial Court upon said petition and answer and a stipulation of facts (Rec. 21). Upon said pleadings and stipulation the Trial Court entered an order dismissing the petition (Rec. 38) and an appeal was taken to the U. S. Circuit Court of Appeals for the Sixth Circuit (Rec. 42), which affirmed the order of the District Court (Rec. 54-57). A petition for rehearing was filed and denied (Rec. 65). The main issues involved in the Trial Court were the respective rights to property sold under an unrecorded conditional sale agreement of the vendor (petitioner here) and the Trustees in Bankruptcy of the vendee (respondents here) under such agreement.

The property so sold consisted of five barges which at the date of the execution of the conditional sale agreement were located in the State of Illinois on the banks of the Mississippi River. After the execution of the said agreement and without any contemplation of the parties in respect thereto the barges were removed to the State of Kentucky by the vendee. Illinois does not require the recordation of a conditional sale agreement to enforce it against third persons but the State of Kentucky does. An involuntary petition under Section 77B of the Bankruptcy Act as Amended was filed against the vendee and the Trustees, who are the respondents here, were appointed in said proceeding. There was a default in the payment of the installments due under the agreement and petitioner served a notice of cancellation of the contract both upon the buyer and the receiver appointed in the bankruptcy proceedings. This notice was served prior to the appointment of the trustees. Following their appointment the

intervening petition seeking to reclaim the property was filed and the trustees resisted said petition principally on the grounds that the conditional sale agreement had not been recorded in the State of Kentucky.[1]

The main issues in the Appellate Court were that a Court of Bankruptcy in a 77B proceeding had no jurisdiction over property in the possession of the debtor whose rights therein were only those of a conditional vendee[2]; that the retention of the property by the trustees was wrongful inasmuch as a demand for a return of the property was made upon the receiver appointed in the same proceeding prior to the appointment of the trustees and who having no title to the property and there being a default in the conditional sale agreement, wrongfully refused the return thereof; the Trustees did not show that there were any subsequent creditors without notice so as to entitle them to maintain that position; the insolvent condition of the buyer constituted such a presumption of fraud as to vitiate the sale and entitle the seller to the return of the property; and the contract was valid in the State of Illinois where it was made and remained so not being contrary to any public policy of the State of Kentucky.

During the proceedings the barges were sold by stipulation of the parties and the proceeds thereof amounting to $3500 are being held in lieu thereof pending the final disposition of the reclamation petition.

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1. These facts are all recited in the stipulation of facts, pages 21 to 37 of the Transcript of Record.

2. The same is true under the Chandler Act.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of said Circuit Court of Appeals as to the inclusion within the jurisdiction of the Bankruptcy Court under a Section 77B proceeding of property in possession of the debtor whose rights therein were only those of a conditional vendee, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *In Re Lakes Laundry*, 79 Fed. 2d 326.

2. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case was in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *In Re Pointer Brewing Company*, 105 Fed. 2d 478 wherein it was held that a conditional sale agreement being valid as between the parties, title to the property remained in the vendor so that when the vendee filed its petition for reorganization the property covered by the conditional sale contract was not the property of the debtor and did not pass to the trustee.

3. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the 4th Circuit in the case of *Manly* v. *The Ohio Shoe Company*, 25 Fed. 2d 384 wherein it was held that the purchase of goods on credit by one insolvent at the time is presumptively a fraudulent transaction and one which would vitiate the sale so as to entitle the vendor to the return of the goods. To like effect are decisions in other circuits, viz: *In Re Weissmann*, 19 Fed. 2d 769 (CCA 1); *California Conserving Co.* v. *D'Avanzo*, 62 Fed. 2d 528 (CCA 2); *In re Gold*, 210 Fed. 410 (CCA 7).

4. The conflict of law question involved is far reaching in its application and importance. There is a conflict in the decision of the Circuit Court of Appeals and the local law on that phase of the question.

5. There is a conflict in the decision of the Circuit Court of Appeals, from a previously unbroken uniformity of decision in this country as to what constitutes a subsequent creditor.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 8749, United Construction Company, Appellant, v. G. Sam Milam and Robert M. Coleman, Jr., Trustees for Diamond Rock Asphalt Corporation, Appellees, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court, and for such further relief as to this court may seem proper.

Dated May 29, 1942.

CHARLES BUSHNELL FULLERTON,
Counsel for Petitioner.

HAROLD V. SNYDER,
Of Counsel.